

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony Hammond; and
Nanci E. Langley

Competitive Product Prices
Express Mail
Express Mail Contract 13

Docket No. MC2013-32

Competitive Product Prices
Express Mail Contract 13 (MC2013-32)
Negotiated Service Agreement

Docket No. CP2013-41

ORDER ADDING EXPRESS MAIL CONTRACT 13 TO THE COMPETITIVE PRODUCT
LIST AND CONDITIONALLY APPROVING THE ASSOCIATED
NEGOTIATED SERVICE AGREEMENT

(January 25, 2013)

I. INTRODUCTION

The Postal Service seeks to add a new product identified as Express Mail Contract 13 to the competitive product list.¹ For the reasons discussed below, the

¹ Request of the United States Postal Service to Add Express Mail Contract 13 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, January 11, 2013 (Request).

Commission approves the request to add Express Mail Contract 13 to the competitive product list and conditionally approves the associated negotiated service agreement.

II. BACKGROUND

On January 11, 2013, in accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.*, the Postal Service filed the Request, along with supporting documents. In the Request, the Postal Service asserts that Express Mail Contract 13, which has an expected term of three years, is a competitive product, and one that is “not of general applicability” within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Postal Service further asserts that the prices and classification underlying the contract are supported by Governors’ Decision No. 11-6.² Among the supporting documents, the Postal Service included a statement supporting the Request, a certification of compliance with 39 U.S.C. 3633(a), a copy of Governors’ Decision No. 11-6, and a contract related to the proposed new product. In addition, the Postal Service submitted an application for non-public treatment of materials, including redacted portions of the contract, customer-identifying information, and related financial information filed under seal. Request, Attachment F.

On January 14, 2013, the Commission issued an order establishing the two dockets, appointing a Public Representative, and providing interested persons with an opportunity to comment.³

² Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Domestic Competitive Agreements, Outbound International Competitive Agreements, Inbound International Competitive Agreements, and Other Non-Published Competitive Rates, March 22, 2011 (Governors’ Decision No. 11-6).

³ Order No. 1622, Notice and Order Concerning the Addition of Express Mail Contract 13 to the Competitive Product List, January 14, 2013.

On January 16, 2013, Chairman's Information Request No. 1 was issued.⁴ The Postal Service filed its response on January 23, 2013.⁵

III. COMMENTS

The Public Representative filed comments on January 22, 2013.⁶ No other interested person submitted comments. The Public Representative states that he has reviewed the contract and supporting materials and that the contract appears to be beneficial to the Postal Service, the contract partner, and the general public. PR Comments at 1. Based on the financial workpapers filed by the Postal Service, the Public Representative believes that it is very likely that the contract will meet the requirements of 39 U.S.C. § 3633(a) during the first contract year. *Id.* at 2. However, without data on expected inflation rates for relevant cost segments and expected volumes for years two and three of the contract, he states that there is some risk that the cost coverage level will fall. *Id.* Nonetheless, the Public Representative expects that the contract will meet the requirements of 39 U.S.C. § 3633(a) in years two and three of the contract due to: (1) the Postal Service's ability to exercise the early termination provision, (2) the Postal Service's experience with prior Express Mail agreements, and (3) the Commission's ability to review these agreements during its Annual Compliance Determination. *Id.* The Public Representative concludes that Express Mail Contract 13 satisfies the relevant statutory criteria and contains provisions favorable to both the Postal Service and the public. *Id.* He recommends that the Commission request that future competitive contract filings include estimates of volumes, revenues, and attributable costs for each contract year. *Id.* at 1.

⁴ Chairman's Information Request No. 1, January 16, 2013 (CHIR No. 1).

⁵ Response of the United States Postal Service to Chairman's Information Request No. 1, January 23, 2013 (Response to CHIR No. 1). Contemporaneously with its Response to CHIR No. 1, the Postal Service filed a Motion for Late Acceptance of Response to Chairman's Information Request No. 1, January 23, 2013 (Motion for Late Acceptance). That Motion for Late Acceptance is granted.

⁶ Public Representative Comments, January 22, 2013 (PR Comments).

IV. SUPPLEMENTAL INFORMATION

CHIR No. 1 sought information on how contract prices will be adjusted in contract years two and three. CHIR No. 1 at 1. In its Response, the Postal Service states that the “standard annual adjustment provision was inadvertently excluded from the draft of the contract that was ultimately signed.” Response to CHIR No. 1 at 2. The Postal Service explains that “prices will be adjusted annually by the average change in Express Mail prices” and that the Postal Service would file an amendment to the contract reflecting this annual adjustment. *Id.* The Postal Service states that the customer agrees “in principle” to a contract amendment, and that the amendment will be filed within the next month. *Id.*

V. COMMISSION ANALYSIS

The Commission has reviewed the Request, the contract, the financial analysis provided under seal, the Response to CHIR No.1, and the comments filed by the Public Representative.

Product list requirements. The Commission’s statutory responsibilities when evaluating the Request entail assigning Express Mail Contract 13 to either the market dominant or competitive product list. See 39 U.S.C. § 3642(b)(1); 39 C.F.R. 3020.30(d). In addition, the Commission must consider the availability and use of private sector enterprises engaged in delivering the product, the views of those who use the product, and the likely impact on small business concerns. See 39 U.S.C. § 3642(b)(3); 39 C.F.R. 3020.30(f), (g), and (h).

The Postal Service asserts that it provides Express Mail service in a highly competitive market, that other shippers who provide similar services constrain its bargaining position, and that it can neither raise prices nor decrease service, quality, or output without risking the loss of business to competitors. Request, Attachment D at 2. The Postal Service affirms that the contract partner supports the Request, that expedited shipping is widely available from private firms, and that it is unaware of any

small business concerns that could offer comparable services to the contract partner.
Id. at 3.

Having considered the relevant statutory and regulatory requirements and the Postal Service's supporting justification, the Commission finds that Express Mail Contract 13 is appropriately classified as competitive and will be added to the competitive product list.

Cost considerations. Because Express Mail Contract 13 is a competitive product, the Postal Service must also show that the contract covers its attributable costs, contributes to the Postal Service's institutional costs, and does not cause any market dominant products to subsidize competitive products. 39 U.S.C. § 3632(b)(3), *id.* § 3633(a), and 39 C.F.R. 3015.5.

The Postal Service submitted a certified statement, along with supporting revenue and cost data, which demonstrate that the instant contract satisfies the statutory and regulatory requirements for the first year. The data demonstrate that the contract's prices will likely cover their costs during the first year. However, subsequent years of the contract may be problematic.

In Response to CHIR No. 1, the Postal Service indicates that the contract, as filed, "inadvertently excluded" its standard annual adjustment provision, which generally governs adjustment of contract prices in years two and three. The Postal Service also represents to the Commission that it intends to file an amendment to the contract to remedy this issue. Given this oversight and the Postal Service's representations, the Commission conditionally approves Express Mail Contract 13 for its expected three year term subject to the Postal Service filing a contract amendment as represented in its Response to CHIR No. 1. If the forthcoming amendment contains only the standard annual adjustment provision,⁷ this condition is satisfied, and the contract is authorized

⁷ See *e.g.*, Docket Nos. MC2011-12 and CP2011-48, Request of the United States Postal Service to Add Express Mail Contract 10 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, December 16, 2010, Attachment B at 2.

for the three-year term. Under those circumstances, the Commission anticipates taking no further action in this proceeding.

If, however, the forthcoming contract amendment differs from the standard annual adjustment provision or contains additional terms, the Commission will notice that filing for comment prior to making a finding on whether the conditions of this Order have been satisfied. In its notice filing the contract amendment, the Postal Service shall indicate whether the standard annual adjustment provision is being utilized and shall identify additional terms, if any. If no amendment is filed, the contract's authorization is limited to one year.⁸

Other considerations. By its terms, the contract becomes effective one business day following the day that the Commission issues all necessary regulatory approval⁹ and allows the contract partner and the Postal Service to terminate the agreement upon 30 days' written notice. Request, Attachment B at 3.

The Postal Service shall promptly notify the Commission if the instant contract is terminated prior to the scheduled expiration date or if the Postal Service intends to cancel the contract after the first year.

Within 30 days after the instant contract terminates, the Postal Service shall file the annual (contract year) costs, volumes, and revenues disaggregated by weight and zone associated with the contract.

The revision to the competitive product list appears below the signature of this Order and is effective immediately.

⁸ If the anticipated amendment is not filed, mandatory termination of the contract prior to the start of the second contract year should not cause undue hardship since the contract contains a provision allowing either party to terminate the contract on 30 days' written notice. Request, Attachment B at 3.

⁹ In light of Contract Provision II, which states the effective date of the contract is "one business day following the day in which the Commission issues all necessary regulatory approval," the Commission intends for this Order to serve as the "necessary" Commission approval to implement the prices associated with the first year of the contract.

VI. ORDERING PARAGRAPHS

It is ordered:

1. Express Mail Contract 13 (MC2013-32 and CP2013-41) is added to the competitive product list as a new product under Negotiated Service Agreements, Domestic.
2. The Postal Service shall notify the Commission if the instant contract ends prior to the scheduled expiration date as discussed in this Order.
3. Within 30 days after the contract terminates, the Postal Service shall file the annual (contract year) costs, volumes, and revenues disaggregated by weight and zone.
4. As discussed in the body of this Order, the contract and associated rates are conditionally approved for year one. Approval for years two and three is conditioned on the filing of a contract amendment, as described above.
5. The Secretary shall arrange for publication in the *Federal Register* of updated product lists reflecting the changes made in this Order.

By the Commission.

Shoshana M. Grove
Secretary

CHANGE IN MAIL CLASSIFICATION SCHEDULE
CHANGE IN PRODUCT LIST

The following material represents changes to the product list codified in Appendix A to 39 CFR part 3020, subpart A—Mail Classification Schedule. These changes reflect the Commission's order in Docket Nos. MC2013-32 and CP2013-41. The Commission uses two main conventions when making changes to the product list. New text is underlined. Deleted text is struck through.

Part B—Competitive Products

2000 Competitive Product List

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Negotiated Service Agreements

Domestic

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Express Mail Contract 13

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